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Massachusetts Law Quarterly

A COCKTALE
OF REPRINTS MORE OR LESS ADAPTED TO THE
OCCASION OF THE DINNER UNDER THE AUSPICES
OF
THE MASSACHUSETTS BAR ASSOCIATION
THE LAW SOCIETY OF MASSACHUSETTS
AND
THE BAR ASSOCIATION OF THE CITY OF BOSTON
IN HONOR OF
JACOB M. LASHLY
PRESIDENT OF THE AMERICAN BAR ASSOCIATION
AT THE
REGIONAL CONFERENCE OF REPRESENTATIVES
OF
STATE AND LOCAL BAR ASSOCIATIONS
IN NEW ENGLAND AND NEW YORK
AT THE HOTEL SOMERSET, BOSTON
JANUARY 15TH, 1941

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DANIEL WEBSTER'S RECIPE FOR CHOWDER?

(From the *Springfield Union* of February 27, 1936.)

The following information should interest those lawyers who like to visualize the "human" side of historical figures.

To the Editor of the Union:

Sir: After reading an item in a Springfield newspaper about fish chowder recipes I am copying from an old recipe book.

"Webster's chowder; Daniel Webster was famous for the excellence of his chowder, and the following is his recipe for making it: Four tablespoonfuls of onions fried with pork; 1 quart of boiled potatoes, well mashed; 1½ pounds of ship biscuit, broken; 1 teaspoonful of thyme; one-half bottle of mushroom catsup; 1 bottle of port or claret; ½ a nutmeg, grated; a few cloves, mace, allspice and slices of lemon, and some black pepper; 6 pounds of blue or white fish, cut in slices; 25 oysters. The whole to be put in a pot, covered with an inch of water, cooked slowly and stirred gently."

One hundred years ago the old-timers really did like to eat.

H. G. Farr.

Springfield, February 26, 1936.

MR. PLEYDELL'S CHARACTERIZATION OF LAW

"In civilized society," said Mr. Pleydell, "law is the chimney through which all that smoke discharges itself that used to circulate through the whole house, and put every one's eyes out — no wonder, therefore, that the vent itself should sometimes get a little sooty" ("Guy Mannering," Chapter 39).

"EVERY DETAIL . . . IN THE ADMINISTRATION OF JUSTICE AFFECTS, IN SOME WAY OR OTHER, THE LIVES OF MORE INDIVIDUALS THAN IS GENERALLY REALIZED."

(16th Report of Mass. Judicial Council, 1940, p. .)

EXTRACT FROM GOVERNOR SALTONSTALL'S ADDRESS TO THE MASSACHUSETTS LEGISLATURE, JANUARY, 1941

"JUSTICE SPEEDILY RENDERED INSPIRES CONFIDENCE. OUR COURTS ARE MUCH MORE NEARLY UP TO DATE THAN THEY WERE SEVERAL YEARS AGO. I RENEW MY RECOMMENDATION THAT SUCH LEGISLATION BE ENACTED AS MAY BE NECESSARY TO KEEP THE STRUCTURE ABREAST OF MODERN NEEDS; AND, IN ANY EVENT, TO ENABLE THE COURTS TO MAKE THEIR OWN RULES OF PRACTICE AND PROCEDURE."

IN MEMORIAM

GEORGE RICHARDS GRANT

Member of the Board of Governors of the American Bar Association, from First Judicial Circuit, died suddenly, on December 28, 1940, after joining in the call for this regional conference.

EXTRACT FROM AN ARTICLE BY MR. LASHLY IN THE "AMERICAN BAR ASSOCIATION JOURNAL" FOR DECEMBER, 1940

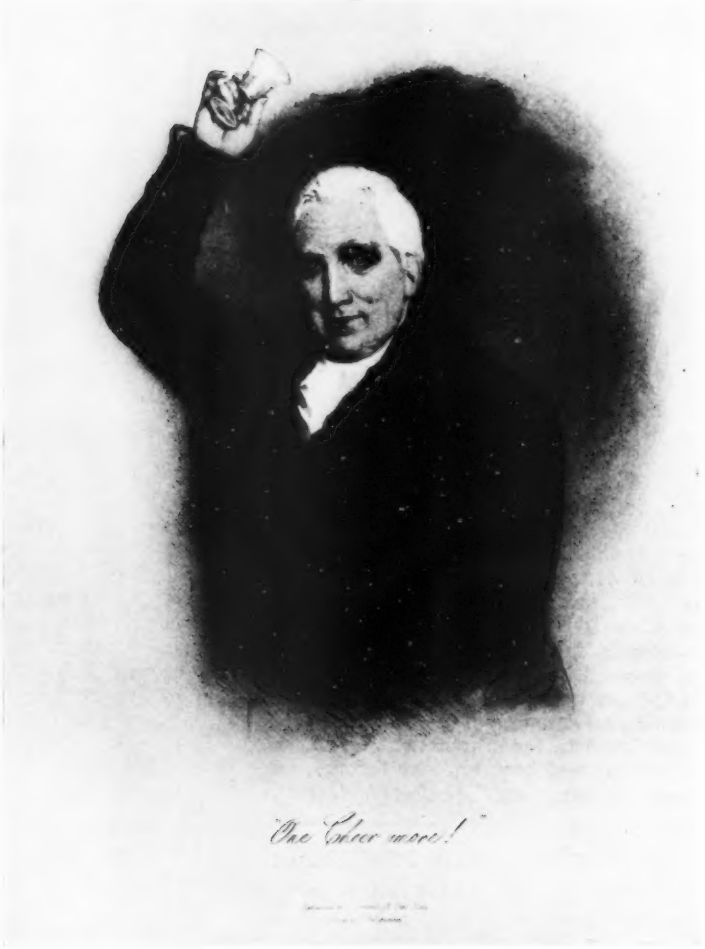
"That our own country has entered upon an era of pragmatism in which principle often is sacrificed to efficiency or expediency is known to thinking people of all walks of life. Many of those who advocate a mild form of executive absolutism; most of the apologists for administrative freedom from judicial review, ground their contention upon the claim that the judicial process is ineffective to get the business of the people done; that it is slow, complicated, antiquated and obscure. Numbers of people are being persuaded that sound precedent and certainty in the solution of justiciable problems are less important than quick action in doing the will of the majority at a given time. It is but a short stride to the conclusion that individual justice is of secondary importance or even that it is immaterial, and that the decisions of some person or selected group arbitrarily arrived at, as to what is best for the social order or the economic security, are acceptable as the law of the land. Thus justice is sacrificed on practical grounds. It must be obvious to all that leadership in the correction of such modern misconceptions must be assumed by the organized bar. No other group could be qualified, or so well qualified, as the Bench and Bar to come to grips with these dangerous heresies. But in order to do so the implements used in the administration of justice must be re-examined repeatedly and kept in order through unremitting attention from those who use them."

THE VALUE OF PICTURES IN LAW BOOKS

Dean Inge, in a lecture on "The Victorian Age," referred to Carlyle's practice of placing before him, on his desk, a portrait of the man about whom he was writing, and suggested that those who, today, speak with tolerant condescension of some of the great Victorians, might learn something by adopting this practice. It is for this reason that we have reproduced many portraits of judges and lawyers of different generations in this magazine, in connection with law and legal history, in order, as far as possible, to translate names into living beings.

The practice of illustrating law books should be encouraged. We believe that the portrait of Lord Eldon, reproduced on the next page from the frontispiece to Professor Chafee's case book on, "Equitable Remedies," will make any man, old or young, read Lord Eldon's opinions with more interest when he has to.

Some of the pictures in this number may be found interesting as they are not very well known.



JOHN SCOTT, EARL OF ELDON

LORD CHANCELLOR, 1801–1806, 1807–1827

From an old print in the Harvard Law School which appears as the frontispiece to Professor Chafee's Case Book on "Equitable Remedies."

"Equity, when Lord Eldon retired, was no longer a system corrective of the common law; it could only be described as that part of remedial justice which is administered in chancery, while taken generally, its work was administrative and protective, in contrast with that of the common law, which was remedial and retributive."

His sense of justice is illustrated by his dictum, after eloping, that "the only reparation which one man can make to another for running away with his daughter is to be exemplary in his conduct to her."*

*Holdsworth, "Some Makers of English Law," Cambridge University Press (1938), pp. 191 and 200, and Chapter IX.

THE INFLUENCE OF PORT ON LEGAL HISTORY

T. Noon Talfourd, Serjeant-at-law, member of Parliament, a judge of the Court of Common Pleas, and essayist, was one of the literary lawyers of the early 19th century.

A friend of Dickens, he revised the trial scene in *Bardell* v. *Pickwick* and pleaded with Dickens for a more lenient fate of the Artful Dodger in "Oliver Twist" but without success (although he did succeed in the case of Charlie Bates).*

His essay on Lord Eldon and Lord Stowell presents a genial sidelight on legal history which is worthy of rescue from forgotten pages in these days.

John and William Scott, the two sons of a coal-fitter of Newcastle, rose to the head of the legal profession: John, as Lord Eldon the Chancellor for many years, William, as Lord Stowell, the great admiralty judge of the Napoleonic Wars. Serjeant Talfourd says of them:

> "If, however, these great lawyers were not prodigal of extensive entertainments, they loved good cheer themselves, and delighted to believe that it was enjoyed by others. We well remember, more than thirty years ago, the benignant smile which Sir William Scott would cast on the students rising in the dim light of their glorious hall [the Middle Temple, now more or less bombed], as he passed out from the dinner table to his wine in the parliament chamber; his faded dress and tattered silk gown set off by his innate air of elegance; and his fine pale features beaming with a serene satisfaction which bumpers might heighten but could not disturb. He and Lord Eldon perfectly agreed in one great taste — if a noble thirst should be called by so finical a name — an attachment to port wine, strong, almost as that to constitution and crown; and, indeed, a modification of the same sentiment. Sir William Scott may possibly in his lighter moods have dallied with the innocence of claret — or, in excess of the gallantry for which he was famed, have crowned a compliment to a fair listener with a glass of champagne — but, in his sedater hours, he stood fast by the port, which was the daily refreshment of Lord Eldon for a large segment of a century. It is, indeed, the proper beverage of a great lawyer — that by the strength of which Blackstone wrote his Commentaries — and Sir William Grant meditated his judgments — and Lord Eldon repaired the ravages of study, and withstood the shocks of party and of time. This sustaining tranquilizing power, is the true cement of various labours, and prompter of great thoughts. Port only can harmonize with the noble simplicity of ancient law, or assuage the fervour of a great intellectual triumph."

* See "Dickens as a Criminologist," *Journal of Criminal Law and Criminology*, July–August 1938, 170.

Of the King's Bench, 1689–1710.
The first judge to serve with tenure "during good behavior" instead of "during the pleasure of the King," by the Act of Settlement of 1701.

PHILIP YORKE, EARL OF HARDWICKE
Chief Justice of the King's Bench, 1733–1737
Lord Chancellor, 1737–1756

THE PAST, PRESENT AND FUTURE OF THE COMMON LAW[1]

In James the First's historic days,
When the good old Year Books were aging fast,
Ere the Selden Society's studious ways
Had rescued them from their buried past,
A strange old man with a stiff backbone[2]
Became a prophet of all things legal
By saying things to the English throne
Which were not pleasant to persons regal.
He turned the minds of the Junior bar
To contemplate a new scheme of things
And before and after the Civil War
They went to law with the Stuart kings.
The English nation at last contrived
To secure the results of this royal wrench
When Lord Chief Justice Holt arrived
To set the tone of the English bench.[3]
'Twas then that the common law began
To expand as it never had done before
And whenever it failed the needs of man
The Chancellor stretched it more and more:[4]
And, whatever they thought of the politics then,
Of the "Spider" of old Westminster Hall,
Lord Hardwicke's able judicial pen
Gave the Chancery background for us all.[5]
While literature to law was yielding
A magistrate in Henry Fielding:
A playwright novelist on Bow Street bench
Relieved the law of a most nauseous stench.
The "trading justice" there no longer ruled
By taking bribes that justice might be fooled.
Both Fieldings, with the aid of Saunders Welch,

(*Continued on page 7*)

[1] It should, perhaps, be stated that these lines were not read at Dean Pound's conference at the Harvard Law School in August 1936, on "The Future of the Common Law," but, while written in advance of that conference, they constitute a more *or less* accurate report of it.

[2] Lord Coke.

[3] See Chief Judge Bond's article on "The Growth of Judicial Ethics," M. L. Q., May, 1925.

"Holt was one of those men of originality and initiative who by a sort of reflex seem to have been born to meet particular needs; and, if ever a judge might be called dynamic, he was one of the foremost of the kind. . . . He is commonly credited with having inaugurated the modern judicial attitude, or as the phrase now is, judicial ethics. Lord Campbell said of him, that he was 'the model on which, in England, the judicial character has been formed.' And Foss, the historian of the judges of old, says, 'In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that . . . exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench.'"
(And see Holdsworth, "Some Makers of English Law," Chap. .)

[4] Sir Mathew Hale and Lord Nottingham "looked upon equity as a part of the common law and one of the grounds of it." Campbell, "Lives of the Lord Chancellors," Vol. III, p. 330. And see Pollock, "Essays in the Law," 192–3, and Holdsworth, "Makers of English Law," Chapter VII.

[5] "Next to Mansfield [Hardwicke] was the greatest lawyer of the Eighteenth Century." (Holdsworth, p. 179 and Chapter IX.)

COPLEY'S SKETCH FOR A PORTRAIT OF LORD MANSFIELD.
THE MOST MODERN 18TH CENTURY ENGLISH JUDGE.
(By Permission of the Owner—The Boston Athenaeum.)

*"Had there been a succession of judges like Mansfield, the law would not have needed much statutory reforming."**
(Zane, "Select Essays in Anglo-American Legal History," I, 719.)

While Lord Mansfield's political attitude toward the American Colonies, as an adviser to the Crown, was, in the words of Lord Birkenhead, "stupid" and "profoundly wrong," and while he was the subject of virulent attacks by "Junius" and others, and both wrong, and apparently "timid," in his controversy with Pitt and Lord Camden over the function of juries in libel cases, yet, as a judge, he was not only the man who revived the leadership of Lord Holt and bettered his example in developing law to meet modern needs,* but to his everlasting credit he was the outstanding judicial supporter, in the 18th Century, of the principle of religious tolerance. As Lord Birkenhead said, he differed from Holt in that "he respected, not merely tolerated, the religious opinions of all." He protected both Catholics and Protestants by his judgments.**

* See Holdsworth, "Makers of English Law," Chapter VIII.
** "Fourteen English Judges," 180.

HENRY FIELDING
(The Portrait by Hogarth)

SIR JOHN FIELDING

Proceeded London's gangster rule to squelch
By efforts suited to inspire a bard
And guide Sir Robert Peel and Scotland Yard.*
They showed law ceased without administration
And raised the courts in public estimation.
Thus, by administration, law progressed
And put in practice that which it professed.
While character, without which law is naught,
Became the standard of an English Court.
Returning now to legal lights in chief —
The story still stands out in bold relief.
The erstwhile squabbles of judicial pride —
'Twixt law and equity and vice versa
Which made the lawyers' "jealous mistress" hide
Her face in anger and the public curse her —
Are nothing now but long-forgotten wails:
The Lord High "Chanc'llor's foot" had found its stride**
To guide the future growth of law's details —
And place the squabbling judges side by side.
And when the royal George the Third arrived,
Midst many things extremely controversial,
The imp of legal progress still survived —
Lord Mansfield promptly swallowed law commercial.
The Chancellor's growing "foot" grew halting then
In dilatory days of Eldon's doubt,
While critic after critic took his pen
And turned the Court of Chanc'ry inside out ***
To stinging eloquence of Henry Brougham.

---

* See *American Bar Association Journal* for September, 1940, 725–730.

** In Lord Nottingham's day equity was described as varying with the length of the Chancellor's foot and he began to correct that impression.

***See Parke's "History of the Court of Chancery" and "The Extraordinary Black Book" of 1831–1832 before the Reform Bill; also Atlay's, "Victorian Chancellors," Vol I., and Sunderland's "Hundred Years War for Legal Reform in England," Har. Law Rev., 1926, and 12 Mass. Law Quart., November, 1926.

And rather slight reforms of Lyndhurst's time,
Which left the fog and the surrounding gloom
For Dickens and for "Bleak House"—(not in rhyme).
While under the most caustic Bentham's sway
And Romilly and Howard's minds and hearts
There came the dawn of a much better day
For penal justice in its darkest parts.
The common rules of civil right and wrong,
While Erskine and the King's Bench thrashed about,*
Continued somehow muddling along
By precedent and precedent and doubt:
And the great lawyers of Victoria's reign,
With William Tidd as their most skillful tutor,
Were trained to plead at common law with pain
And Baron Parke — judicial co-adjutor.
While all these things were going on apace
New England grew as a litigious place,
Mixed English law with Deuteronomy
And generated habits of economy.
Lawyers were lacking in the early days
For Massachusetts men disliked their ways,
And clerics, who read law, and laymen too
Made much good law which, at that time, was new:**
But, finally, a fighting bar was needed,
And, as it grew, the lawyers then proceeded
To teach the judges, with some hesitation,
Something about the law's administration.
Then, by a course of steady evolution,
There came from history our constitution:
And when we ceased to be a Crown dependency,
Pound tells us, law displayed a Gallic tendency,
From which 'twas rescued, to their lasting glory,
By Nathan Dane, James Kent and Joseph Story.
When judges think they make the law today —
Let them remember how it came their way,
The bench and bar, reacting on each other,
Make real the fiction of the "legal brother"—
Yet, even so, our law would be stagnation
Without the public's constant stimulation.
Laymen have made as much law as the rest of us
And sometimes better law — than have the best of us.

The present common law is in transition
And, that it may in future reach fruition,
Bumble's description *must* not come to pass:
Law must not be a too complacent ass.***

F. W. G.

---

* Lord Erskine is generally conceded to be the greatest advocate in the history of the English bar. By his arguments to juries he prepared the way for Fox's Libel Act; and by his arguments in cases of constructive treason he restrained and steadied the English government in the hysterical period of the French Revolution. (Howell's "State Trials" and Lobat-Fraser's "Erskine," Cambridge University Press, 1932.)

** "The Body of Liberties" of 1641 (obtainable for 5 cents at the Old South Church, Boston), and the Mass. Laws of 1648. (Harvard University Press, 1929.)

*** "The law supposes that your wife acts under your direction," said Mr. Brownlow. "If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass."—Oliver Twist, Chapter LI.

"LEST WE FORGET"

CAUSTIC COMMENTS ON THE LEGAL PROFESSION, PAST AND PRESENT

The last stanza of Robert Burns's poem "To a Louse — On seeing one on a lady's bonnet at church" may well inspire reflection by the legal profession.

> "O wad some power the giftie gie us
> To see oursels as others see us!
> It wad frae monie a blunder free us
> An' foolish notion:"

Jack Cade's desire to "kill all the lawyers" has been quoted to the bar *ad nauseam*, and a little variety in the reminders of historic abuse of the profession is more interesting.

Dean Swift described the legal profession in his caustic manner in the fourth part of "Gulliver's Travels" in 1726.

Comments on the bar have not been confined to writing. Gilray, Rowlandson, and other caricaturists during the past one hundred and fifty years have frequently expressed their views in pictorial form, and we reproduce two of these caricatures which appeared in the early part of the nineteenth century.

The profession in New York was lashed by the pencil of Nast during the reign of Boss Tweed, which led to the organization of the Bar Association of the City of New York.

(See Paine's "Thomas Nast, His Period and His Pictures," the Macmillan Co. 1904, , and Sheldon's "Early History of the New York Association", 5 Mass. Law Quart. No. 4, August, 1920.)

Coming down to the present time, Mr. Will Shafroth opened an article a few years ago with the following passage:

> "The general opinion of the legal profession held by laymen is not flattering to the lawyers. Carl Sandburg has put it into poetry in the following words:
>
> 'The work of a bricklayer goes to the blue.
> The knack of a mason outlasts a moon.
> The hands of a plasterer hold a room together.
> The land of a farmer wishes him back again.
> Singers of songs and dreamers of plays
> Build a house no wind blows over.
> The lawyers — tell me why a hearse horse snickers
> hauling a lawyer's bones.'
>
> "Much of the reason for this lies in the inefficient manner in which our law machinery work."

JEREMY BENTHAM

HENRY BROUGHAM, ESQ.*

JEREMY BENTHAM — THE GREAT CRITIC AND SUGGESTER

"It took nearly half a century for any scheme of Bentham's to sink into the minds of the British public, and then to ooze through them into the brains of our legislators. The legal profession . . . ignored Bentham and all his works; they regarded him merely as an elderly gentleman full of visionary schemes which he dimly expounded in very bad English." ("A Century of Law Reform," Macmillan & Co., Ltd., 1901, 232.)

"Dumont and J. S. Mill . . . took his manuscripts and made them intelligible. They interpreted Bentham," whose "suggestions were passed through the minds of practical lawyers and statesmen, such as Brougham and Mackintosh and Romilly and many others, who, sometimes to Bentham's disgust, modified them, in order to give them a practical shape. Bentham's reputation owes something to all these pieces of good fortune." (Holdsworth, "Some Makers of English Law," 254–5 and Chapter XI.)

LORD BROUGHAM

". . . it is the natural course in things judicial for a procedure to stiffen as in an arctic frost. . . . Against the old Court of Chancery as it existed in all its glory prior to 1852, the complaint was three fold—*Expense*, *Delay* and *Vexation*." ("A Century of Law Reform," 179 and 191.)

In 1828, in the House of Commons, Brougham moved for a commission "to enquire into the defects occasioned by time and otherwise, in the laws. . . . Chancery and Lord Eldon had hitherto borne the brunt of the reformers' onslaught. Brougham took upon himself to show that in every department of our jurisprudence, in the common law, in the crim'nal law, in the ecclesiastical law, in the shoals of the petty local courts, there were to be found abuses and anachronisms not less glaring or less productive of daily misery and injustice. . . . This speech may be said, without exaggeration, to have led, directly or indirectly, to a greater number of beneficial and useful reforms than any other, ancient or modern, and its extraordinary wealth of detail may be recommended to those who are inclined to scoff at the qualifications of Brougham as an initiator of legislation." (I Atlay, "Victorian Chancellors," Little Brown & Co., 283–294.)

The efforts and influence of Lord Denman for thirty or forty years should also be remembered.

When Brougham was made chancellor in 1830, "the Duke of Wellington is reported to have said that Brougham was 'the only man with courage and talent to reform that damned court.'" (I Atlay, p. 294.)

*As the Queen's Attorney General, sketched by A. Wivell in the House of Lords, 1820.

From an Old Colored Print. "'London,' Pub'd. by G. Hodgson, 10 Cloth Fair and Fleet Street." The print is not dated nor is the draftsman's name given, but the nose and the barrister's wig and robe show that it is a picture of Lord Brougham, after his great speech on legal reform in the House of Commons in 1828, and shortly before he ascended the woolsack (as indicated in the picture) by his appointment as Lord Chancellor, November 22, 1830

From an Old Colored Print. "'London,' Pub'd. by G. Hodgson, 10 Cloth Fair and Fleet Street." The print is not dated nor is the draftsman's name indicated, but from the nose of the Chancellor, who, with his seal, is standing on the woolsack, it is evidently a picture of Lord Brougham shortly after his appointment as Lord Chancellor in November, 1830

JOHN READ
Attorney General 1725–1727
(From a portrait by Smibert)

THEOPHILUS PARSONS
From a miniature painted from life by Malbone, in 1796

THE FIRST LEADER OF THE MASSACHUSETTS BAR

The first real leader of the bar appeared in Massachusetts about 1722 from Connecticut in the person of John Read, who trained both the bench and his colleagues at the bar in the value of legal study, formal procedure, and restraint of their habitually verbose tendencies. In this he was supported by another leading lawyer, Robert Auchmuty, who was also a judge of Admiralty. Other leaders who gradually came to the front in the second quarter of the 18th century were Jeremiah Gridley, sometimes called "the Father of the Bar," Benjamin Pratt, later Chief Justice of New York, Oxenbridge Thacher, and James Otis, Jr.

THE FIRST MODERN ADMINISTRATOR IN MASSACHUSETTS

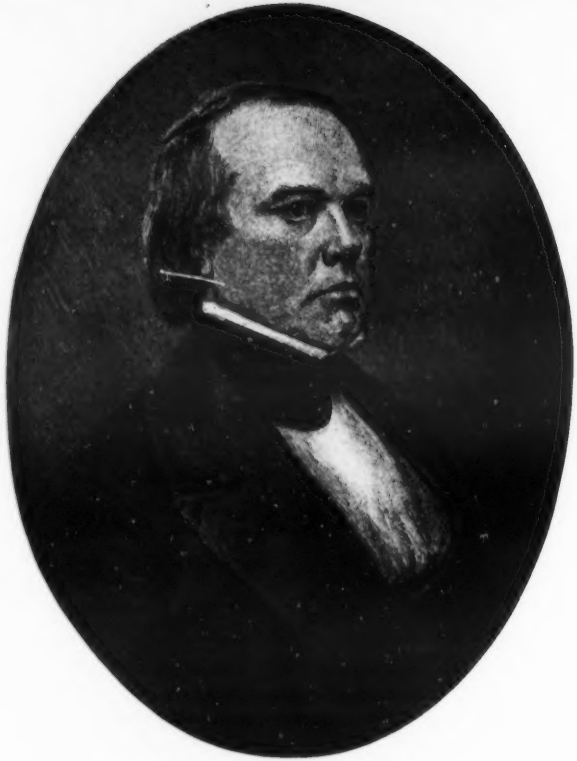
The draftsman, at the age of twenty-eight, of the "Essex Result" (a neglected historic document of 1779 preceding the Massachusetts Constitution and calling for a "Bill of Rights"), Theophilus Parsons became the leader of the bar. He was the leader and draftsman in suggesting the Federal "Bill of Rights" proposed by Hancock in the ratifying convention in 1788. The 10th amendment was ultimately adopted as he drew it without change. (See Harding's "Contest over Ratification in Mass.")

In 1806, he was appointed Chief Justice, without notice, and persuaded to accept at a sacrifice of more than half of his income. In the six years before his death in 1813, he started the modern administration of justice in Massachusetts (See 2 *Mass. Law Quart.* No. 5, May, 1917, p. 519, and "Memoir of Parsons" by his son).

In the "Memoir" of him his son, Professor Theophilus Parsons, said (at p. 199):

"I believe there was nothing which my father more desired than that the people should cultivate in themselves a kind and respectful, but watchful jealousy of the judicial department; and should feel a deep and sincere, and yet a rational respect for it, founded upon a just understanding of the vast importance of its functions. And that the people might so feel, the very first and most essential cause must be, that the judicial department should *deserve* to be so regarded. He wished that the people should see and know, clearly and certainly, the utility of the judiciary *to them;* and that they should see and know as clearly the means by which their utility might be secured and preserved.

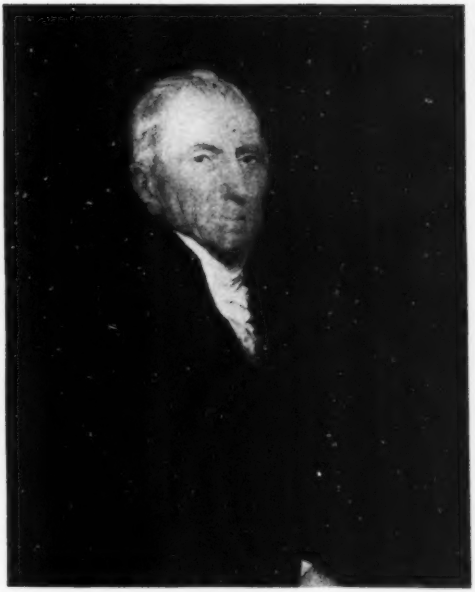
"In this department he included, not the judges only, but all who were officers of the courts; and among them he placed all who practised at the bar. And I believe that he was earnest and constant in his endeavors to impress upon his students, and upon others who came within his reach, that it was the duty of every lawyer to feel that upon himself rested some portion of the responsibility, and of the power for good or for evil, with which the institutions of a constitutional republic invest its judicial department."



BENJAMIN ROBBINS CURTIS
Justice of the United States Supreme Court, 1851–1858
Chairman of the Commission on the Massachusetts Practice Act of 1851 which simplified Common Law Pleading

LEMUEL SHAW
Chief Justice Supreme Judicial Court, 1830–1860
"With Jackson's help in clarifying statutes, and Story's texts financed by Nathan Dane, Shaw stabilized the law of Massachusetts and drove the coding fever on the wane." (See 1 *M. L. Q.*, August 1916, p. 319, and "Lemuel Shaw, Chief Justice," by Frederic L. Chase.)

PETER OXENBRIDGE THACHER
...e of the Muncipal Court of Boston, 1823–1843



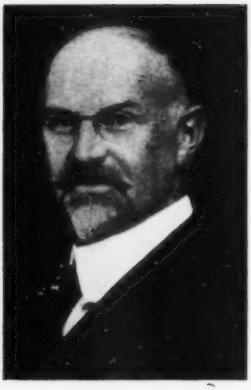
NATHAN DANE
The Real Founder of the Harvard Law School

PETER OXENBRIDGE THACHER

A judicial administrator, still an authority on the criminal law (See Thacher's Criminal Cases), who developed the practice of probation in Massachusetts by judicial action forty years, or more, before there was any statute on the subject. (See "Probation as an Orthodox Common Law Practice," 2 *Mass. Law Quart.*, August, 1917, 591.)

NATHAN DANE

A member of the Continental Congress, author of the "Ordinance [of 1787] for the Government of the Territory Northwest of the Ohio," he began in 1800, and finished in 1826, his Abridgment of American Law, a work which then became indispensable to an American lawyer, and still has a value for its reports of early American law. In this work he was following the example of Viner, whose Abridgment was yet authoritative. Viner had founded the Vinerian Professorship of English Law at Oxford from the royalties of his book. The lectures of his first professor, Blackstone, had become "Blackstone's Commentaries." Dane, who had followed Viner's example, established a professorship at Harvard from the proceeds of his Abridgment. Devoting ten thousand dollars to the foundation, and desirous of stimulating legal authority as Viner had done, he provided that the lectures delivered should be published. Story's series of Commentaries, Greenleaf's Evidence, Parsons' works, and Langdell's published writings were all issued in compliance with this provision. On Dane's nomination in 1829, Joseph Story was appointed as first Dane Professor. Story had already refused the Royall Professorship, but was willing to become the head of the School and devote to it all the time which could be spared from the duties of his judgeship. In 1832 Dane provided funds for Dane Hall, a small building which continued as the home of the School for more than fifty years until the building of Austin Hall.



GEORGE R. NUTTER
of Boston

HON. HENRY N. SHELDON
Chairman,
Justice Superior Court
1894–1905
Justice Supreme Judicial Court
1905–1915

ADDISON L. GREEN
of Holyoke

THE MASSACHUSETTS JUDICATURE COMMISSION
1919–1921

THE INFLUENCE OF THE MASSACHUSETTS JUDICATURE COMMISSION IN THE JUDICIAL COUNCIL MOVEMENT

The handbook of the National Conference of Judicial Councils contains a preface by Hon. James W. McClendon, Chief Justice of the Court of Civil Appeals of Texas, Chairman of the National Conference, from which the following passages are quoted:

"The judicial council movement has been aptly described as 'probably the most significant, if not the most important, development which has taken place in the judicial history of the United States during the last half century.'

"In the background of the movement, extending back well into the nineteenth century, was an ever-widening discontent at the palpable failure of the judicial branch of government to meet the needs of our rapidly changing social, economic and industrial conditions."

After referring to the address of Dean Pound on "The Causes of Popular Dissatisfaction With the Administration of Justice," in 1906, Judge McClendon continued:

"Some seven years later the American Judicature Society was born, having for its general objective improvement of judicial administration. That organization has from time to time sponsored important expedients and methods designed to effectuate this objective. Among these was the judicial council—an official body charged with the duty of continuous study of the judicial system and its functioning, and the devising of methods for the improvement of the system and its adaptation to present-day needs.

"Probably the first organization of this character was the Board of Circuit Justices set up in Wisconsin in 1913. . . . A similar body was authorized in New Jersey in 1915. It was not, however, until the comprehensive final report of the Massachusetts Judicature Commission in 1921, recommending creation of a judicial council in that state, that the movement attained concerted semblance. The following year, upon recommendation of Mr. Justice Taft, the Federal Conference of Senior Circuit Justices was created; and in the next seven years state judicial councils were created: in Oregon and Ohio in 1923; in Massachusetts and Maryland in 1924; in Washington and North Carolina in 1925; in California and North Dakota in 1926; in Kansas, Rhode Island and Connecticut in 1927; in Virginia and Kentucky in 1928; and in Texas, Michigan, Illinois, Pennsylvania and Idaho in 1929.

"At the present time more than half the states have judicial councils, all of which, though varying widely in their component personnel, have the common objective."

THE HISTORY OF JUDICIAL ROBES IN MASSACHUSETTS

Before, and for a short time after, the Revolution, the bar was classified into barristers and attorneys and both judges and barristers wore wigs and gowns until about 1792.

Then came Chief Justice Dana, strong and just,
But prejudiced about Judge Thomas Dawes,
On whose appointment Dana said "We must
Not wear our robes if Dawes dispenses laws."*
Thus did the court discard judicial robes
For seven and one hundred long-drawn years,
Until the bar besought Chief Justice Holmes
To don judicial costume without fears.
Then Parsons, drafted to the court, began
To introduce more business-like ideas
Of justice meted out upon a plan
Based more on commonsense in hearing pleas.

We understand that the wearing of robes is ridiculed in some states, but there is nothing "undemocratic" about a judicial costume. We expect soldiers and policemen and court officers to be suitably dressed — why not a judge? The late Albert E. Pillsbury, former attorney-general, whose caustic tongue prevented his being governor, was quoted as saying, when the robe was put on again, "It is desirable that the judges should, at least, have the appearance of learning."

* See "Memoir of Justice Increase Sumner" by his son W. H. Sumner, and 2 Mass. Law Quart. No. 5, May 1917, 425.

THE PROVERBIAL ATTITUDE OF PRACTISING LAWYERS TOWARD "REFORM"

John C. Gray, in his "Nature and Sources of Law," quoted Professor Dicey:

"'Jurisprudence is a word which stinks in the nostrils of the practising barrister.' . . . Yet as Mr. Dicey goes on to show, 'Prejudice, excited by a name which has been monopolised by pedants or imposters,' should not blind us to the advantages of having clear and not misty ideals on legal subjects."

The word "reform" is also apt to produce a similar reaction in the minds of many busy practising lawyers, who prefer to "stick to the devil they know." The phrase "change to meet the needs of the public and the litigants whose interests are involved, and who pay the bills" is less objectionable, because the profession is expected to study those needs as a condition of public confidence which the lawyers need very much in these difficult times.

"*Now*, least of all, need we make apology for saluting the Benthams and the Broughams who have appeared in each generation, and on both sides of the Atlantic." (Professor Freund in *Har. Law Rev.* for December, 1940, p. 366.)

F. W. G.

"Court procedure seems to us peculiarly one for local experiment in convenience and effectiveness."

(3rd Report Mass. Judicial Council 65–66; cf. Sunderland, Har. Law Rev., April 1926, 744–5.)